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In the Supreme Court
OF THE
United States

OCTOBER TERM 1931

No. 51

WESTERN PACIFIC-CALIFORNIA RAILROAD COMPANY (a corporation),
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, (a corporation),
Respondent.

BRIEF FOR RESPONDENT

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No. 51

WESTERN PACIFIC-CALIFORNIA RAILROAD COMPANY (a corporation),
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, (a corporation),
Respondent.

BRIEF FOR RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO REVIEW A JUDGMENT REVERSING A JUDGMENT OF A DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Statement of the Case.

The sole question which is presented for determination by the petition for writ of certiorari is whether

petitioner was a "party in interest" within the meaning of paragraph (20) of Section 1 of the Interstate Commerce Act and thereby entitled to maintain a suit in the United States District Court to enjoin respondent from constructing a track 8200 feet in length leading from its main line in the City of San Mateo, State of California, across a tract of land immediately adjacent to its right of way, for the purpose of switching carload freight from and to industries which contemplated locating thereon.

At the time petitioner instituted the suit in the United States District Court it only had a charter, and had made an application to the Interstate Commerce Commission for a certificate of public convenience and necessity, but possessed no right of way, it was without any railroad, without any traffic to protect, and the record fails to disclose that the construction and operation of respondent's proposed track would injure petitioner or cause it to suffer any damage.

While other important questions were involved the Circuit Court of Appeals for the Ninth Circuit reversed the judgment entered by the District Court of the United States for the Northern District of California, Southern Division, upon the sole ground that petitioner was not a "party in interest" within the meaning of paragraph (20) of Section 1 of the Act.

The Circuit Court of Appeals stated that it was deemed "unnecessary, if not improper, to consider the doubtful and perplexing question whether the line con-

templated by the appellant (respondent) is a spur or industrial track, wholly within a state and within the exclusive jurisdiction of the state commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission."

The Circuit Court of Appeals predicated its decision upon the fact, which was not controverted, that petitioner had "been organized as a corporation," had "projected a line of railroad" and had "applied to the Interstate Commerce Commission for a certificate of necessity. On these facts, without more, without a railroad, without a right of way, and without traffic to protect, it sought a permanent injunction enjoining the appellant (respondent) from building a spur track, or extending its line, as the case may be."

The Circuit Court of Appeals held that "such showing will not, in our opinion, support or justify an injunction such as was granted here," (46 F. (2d) 729, 730-731).

The sole ground relied upon by counsel for petitioner in their petition for a writ of certiorari was that the Circuit Court of Appeals erroneously decided that petitioner was not a party in interest within the meaning of those words as used in paragraph (20) of Section 1 of the Interstate Commerce Act.

In their brief (p. 6), counsel for petitioner assign as error the failure of the Circuit Court of Appeals to hold that respondent's proposed track is an extension

within the meaning of that term as used in paragraph (20) and that question is fully argued. On this review, this Court may consider and decide the issue which the Circuit Court of Appeals deemed it unnecessary to consider in view of its conclusion that petitioner was not a "party in interest." The better practice, however, is for this Court to confine its consideration to the ground relied on in the petition for the writ. If this Court should decide that petitioner is a "party in interest" within the meaning of paragraph (20), the case should then be remanded to the Circuit Court of Appeals to determine the issues of fact and law involved in the question whether respondent's proposed track is a spur or industrial track, wholly within a state and within exclusive jurisdiction of the State Commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission.

Gunning v. *Cooley*, 281 U. S. 90, 98;
Webster Co. v. *Splitdorf Co.*, 264 U. S. 463, 464;
Liberty Oil Co. v. *Condon National Bank*, 260 U. S. 235, 245.

While we deem it unnecessary, under the better practice, to argue the other questions involved in this case, we have done so in order that this Court may dispose of the whole case in the event the Court considers it desirable to do so.

STATUTES RELIED UPON.

The statutes relied upon are set forth in the Appendix to this brief. They consist of paragraphs (18), (19), (20) and (22) of Section 1 of the Interstate Commerce Act (U. S. C. A., Title 49, Section 1, paragraphs (18), (19), (20) and (22)), and Section 240(a) of the Judicial Code (U. S. C. A., Title 28, Sec. 347(a)).

Argument.

I.

PETITIONER IS NOT A PARTY IN INTEREST WITHIN THE MEANING OF PARAGRAPH (20) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT AND THEREFORE IS NOT ENTITLED TO MAINTAIN A SUIT FOR INJUNCTION TO RESTRAIN RESPONDENT FROM CONSTRUCTING ITS PROPOSED TRACK.

1. Facts in Addition to Those in Petitioner's Brief Necessary to Present the Situation Correctly.

The situation presented by the statement of facts in petitioner's brief (pp. 7-9, 22-23) does not truly depict the situation presented by the record. It is calculated to leave the impression that respondent conceived the idea of constructing its track because of petitioner's application to the Commission for authority to construct its new line and that pending the hearing on petitioner's application, respondent, in an effort to gain an undue advantage, sought to construct an extension of its line without making application to the Com-

mission for a certificate "thus attempting to avoid determination of the question whether its extension is, under the circumstances, warranted by considerations of public convenience and necessity" (petitioner's brief, p. 23). Such is not the case. The record presents an entirely different situation.

Beginning in 1921 the people of San Mateo were desirous of developing that City by locating industries there (R. 231, 232, 241). A number of prospective industries were shown property in San Mateo, particularly the Rose property, with the idea of locating them thereon (R. 232, 241, 242).

These efforts to locate industries in San Mateo were unsuccessful because there were no facilities for switching. So the people of San Mateo insisted that the Southern Pacific (respondent) construct some switching tracks in that section (R. 233). The Southern Pacific had been serving San Mateo since 1863 (R. 126). In 1925 respondent agreed to construct a spur or switch track across the Rose property provided Emma Rose would grant a right of way therefor (R. 140, 233, 234, 241, 242). This, Mr. McCurdy, manager for the Emma Rose property, agreed to do (R. 216). So great was the interest in the construction of switching facilities on the Emma Rose property that a meeting was held in the City Hall of San Mateo in September, 1925, and a committee was appointed to co-operate with the Southern Pacific in constructing such switching facilities on that property (R. 214, 234, 235).

The Emma Rose tract of land consists of about 500 acres (R. 257) situated entirely within the City of San Mateo (Exhibit A attached to defendant's (respondent) answer to amended complaint, R. 28). It abuts appellant's main line right of way for 1907 feet (R. 126). The map contained in the record at page 28 fully shows the situation, the Emma Rose land lying within the City of San Mateo, and respondent's proposed track.

Respondent's original authority for expenditure providing for the construction of this track was dated January 4, 1926, and approved April 29, 1926 (R. 101), more than two years prior to the incorporation of petitioner on July 10, 1928 (R. 2). This authority is a formal document made in compliance with an order of the Interstate Commerce Commission issued in pursuance of Section 19a of the Interstate Commerce Act, paragraph (f) (R. 229, 230). Each authority issued shall describe the change authorized and its location (R. 231). It was impossible for respondent to proceed under this authority because of the failure to get certain paper streets closed and the resulting necessity for changing the place of junction of the spur track with respondent's main line (R. 179, 183).

A revised authority dated November 10, 1927, providing for the spur track in a different location on the Rose property, was approved February 23, 1928 (R. 102). It was necessary to revise this authority again because of a change in length of the track to be con-

structed (R. 183, 184). This second revision of the authority dated August 6, 1928, was approved September 13, 1928 (R. 102). The original authority for expenditure and the revisions thereof, with maps attached, were introduced in evidence as plaintiff's (petitioner here) Exhibit 5 and the original exhibit has been transmitted to this Court.

Each authority provided for the construction of an "Industrial Drill Track," and the authority as finally revised authorized the construction of 8200 feet of drill track on the Emma Rose property to serve that property for its entire width (Exhibit 5). Industrial drill track and switching track are synonymous (R. 249).

By deed dated March 18, 1929, Emma Rose and husband granted respondent the right of way for the industrial drill or spur track (R. 116) and on March 23, 1929, respondent began the construction of this track (R. 5, 16). At that time petitioner had not adopted its resolution of location (R. 287).

At the time of the institution of this suit and at the time of the entry of the decree enjoining respondent from constructing its track, petitioner was without a railroad, without authority from the Commission to construct a railroad, and necessarily without any business to protect. Petitioner (plaintiff in District Court) introduced no evidence showing or tending to show that the construction of respondent's track would injure petitioner in any way, in the event petitioner ever has a railroad and a business.

Counsel for petitioner call attention to the fact that subsequent to the final injunction herein petitioner's proceeding before the Commission was finally determined by the granting of petitioner's application (petitioner's brief, p. 8). Counsel, however, do not call attention to the fact that on March 16, 1931, subsequent to the decision of the Circuit Court of Appeals, upon application of petitioner, the Interstate Commerce Commission entered an order extending the time for the commencement and completion of petitioner's railroad from April 1, 1931, and April 1, 1933, respectively, to July 1, 1931, and July 1, 1933, respectively, and that on June 12, 1931, subsequent to the granting of the writ of certiorari herein, the Commission, upon application of petitioner, again extended the time for the commencement and completion of the construction of petitioner's railroad to January 1, 1932, and January 1, 1934, respectively. Copies of these orders are printed in the Appendix.

2. In Order to Entitle a Party Other Than the Designated Governmental Agencies to Maintain a Suit for Injunction Under Paragraph (20) He Must be Possessed of Some Independent Right of His Own and There Must be an Existing, Impending or Presently Threatened Injury to That Right.

It is the position of counsel for respondent that since paragraph (20) does not define "party in interest", Congress evidently intended that a party to be entitled to maintain the suit for the injunction contemplated by that paragraph must possess those qualifications usually necessary to enable a party to maintain a suit

in equity for an injunction, and the decision of the Circuit Court of Appeals substantially upholds this position. The interest required must be such an interest as is cognizable in equity as a basis for protection by an injunction against existing, impending or presently threatened injury. If petitioner does not possess such an interest, petitioner is not a "party in interest" within the meaning of paragraph (20).

It is an established rule that a court of equity concerns itself only with the protection of property rights, and under this rule it treats any civil right of a pecuniary nature as a property right.

International News Service v. *Associated Press*, 248 U. S. 215, 236;
In re Debs, 158 U. S. 564, 593.

An injunction is issued for the purpose of preventing existing, impending or presently threatened injury.

Connecticut v. *Massachusetts*, 282 U. S. 660, 674;
New Jersey v. *Sargent*, 269 U. S. 328, 331;
Pierce v. *Society of Sisters*, 268 U. S. 510, 536;
Truly v. *Wanzer*, 5 How. 141, 142;
Behre v. *Anchors Ins. Co.*, 297 Fed. 986, 989.

Injunction does not issue because of mere fear or apprehension or against something merely feared as liable to occur at some indefinite time in the future.

Connecticut v. *Massachusetts*, *supra*;
Truly v. *Wanzer*, *supra*;
Behre v. *Anchors Ins. Co.*, *supra*.

Petitioner must show an independent existing right in itself and an existing or presently threatened injury to such right in order to maintain a suit in equity for an injunction.

Sprunt & Son v. *United States*, 281 U. S. 249, 254-257.

Petitioner must base its right to an injunction upon its own rights and not upon a lack of right in respondent.

Edward Hines Yellow Pine Trustees v. *United States*, 263 U. S. 143;

Larimer Ry. Co. v. *Railway Company*, 137 Pa. St. 533.

In *Larimer Railway Co.* v. *Railway Co., supra,* one street railway company filed a bill in equity to restrain another street railway company from constructing its railroad. The court held (p. 547):

> "If, then, the appellants have not, in any way, obtained the consent of the city of Pittsburgh to enter upon these streets for the construction of their road, what standing have they in a court of equity to test the right of the appellees? The consent of the city is a condition precedent to the exercise of their rights under the charter; without this, they have no right, present or prospective, to construct their railway upon the highways of the city, for non constat that this consent will ever be given. It may be that the appellees have no better right; we will decide that question when its arises, but it is plain the appellants have no standing to raise this question for our consideration."

In *Edward Hines Yellow Pine Trustees* v. *United States, supra,* lumber manufacturers and dealers brought suit against the United States to set aside as void an order of the Interstate Commerce Commission requiring carriers to cease and desist, until the further order of the Commission, from collecting a penalty charge of $10.00 per day on lumber held at reconsignment points. In dismissing the bill this Court held (p. 148):

> "But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges."

If petitioner can be said to have any interest at all, it is vague, speculative and unsubstantial. It is very much like the interests involved in *Edward Hines Yellow Pine Trustees* v. *United States, supra,* and in *Pittsburgh & West Virginia Ry.* v. *United States,* 281 U. S. 479.

In the *Hines Case,* in addition to the claim that plaintiffs would be injured as shippers, set up as a basis for an injunction, it was also claimed that the plaintiffs would be injured as a prospective carrier. Plaintiffs were constructing a local railroad which would soon be ready for operation and it was contended that their cars which would move over this railroad to connecting lines would, in the absence of a deterring penalty charge, be used for temporary storage at reconsigning points. In disposing of this claim, this Court said (p. 148):

> "The further claims of plaintiffs are, if possible, even more unsubstantial. They fear that, by reason of the order, they may, in the future, suffer in times of car stortage through the greater use of cars for storage. They fear that the equipment to be used in connection with the railroad which they expect to operate may be diverted, at some time in the future, from transportation uses. If their fears are realized it will be open to them to apply to the Commission for relief."

In the case at bar, petitioner expects to construct and operate a railroad some time in the future. It fears that the construction of respondent's proposed track will injure it in the future, if it does construct and operate a railroad. If petitioner's fears are realized it will be open to petitioner to apply for injunctive relief, provided, of course, respondent's construction and operation of its track is contrary to law.

In the *Pittsburgh & West Virginia Case, supra,* that railroad brought suit to set aside an order of the Interstate Commerce Commission permitting the Wheeling and Lake Erie Railway Company to abandon its station in the City of Cleveland and to use a union station instead. In endeavoring to show that it had an interest in the matter sufficient to maintain the suit for an injunction, the Pittsburgh contended, among other things, that the Wheeling and Lake Erie and the Pittsburgh had been allocated to one system in the Commission's plan for the consolidation of railroads and that it was seeking to acquire control of the Wheeling. This Court held: "but these vague speculative interests are clearly insufficient to give the Pittsburgh an independent standing in this suit." So lightly did this Court regard these speculative interests of the Pittsburgh that it disposed of them in a foot note.

3. Contention of Petitioner.

The position of counsel for petitioner, on the other hand, is that the proceeding authorized in paragraph (20) "is absolutely devoid of the issues incident to actions in equity, and does not afford the relief to be obtained in such an action"; that "it posessses none of the characteristics of an action in equity in either issues or relief to be obtained", except that the relief is to be in the form of an injunction; that the injunction is granted "solely to prevent violation of an express statutory prohibition enacted by Congress" (petitioner's brief, p. 18); and that the primary purpose of the

injunction provided by paragraph (20) is to "prohibit construction contrary to statutory prohibition, and does not protect nor purport to protect any legal right of a plaintiff" (petitioner's brief, p. 13). Counsel for petitioner admit: *"We have never claimed that petitioner ever had any existing legal right invaded or threatened"* (petitioner's brief, p. 26; emphasis ours).

To uphold petitioner's contention it will be necessary for this Court to decide that it was the intention of Congress, in providing for an injunction in paragraph (20), to subvert the established principles of equity heretofore set out as well as the following:

Threatened commission of an offense against laws of the land is insufficient to call into exercise the injunctive powers of a court. Where, however, a violation of law results in actual or threatened interference with property or rights of a pecuniary nature, equity has jurisdiction to enjoin the violation of law, not primarily to prevent such violation, but to protect property rights.

In re Debs, supra, p. 593.

Counsel for petitioner also contend that it has an actual present interest in maintaining the *status quo,* pending the determination of its application (petitioner's brief, pp. 23, 27). Petitioner may be interested in maintaining the *status quo* until it constructs a railroad, gets a business, and acquires rights such as will give it a standing in a court of equity to apply for an injunction to protect such rights from unlawful inva-

sion to its injury, but that is not the interest necessary under paragraph (20). The interest claimed is like that considered in *City of Lawton* v. *Stevens,* 32 Okla. 476, 122 Pac. 940. In that case the City of Lawton sought an injunction to restrain owners of property from selling any lots or parts of land and from erecting any buildings or changing or modifying or interfering with their land on the ground that the City intended to acquire title to the property by condemnation proceedings for the purpose of protecting and increasing its water supply. The City had attempted to buy the land but an agreement as to price could not be reached. The Court, in affirming a judgment denying an injunction, held (p. 478):

> "But we know of no law that would justify a holding that the proprietor of the fee in lands can be deprived of the right to go on to it, use it, or dispose of it, merely because a corporation, municipal or otherwise, alleges that it will need later to acquire, and at some later, indefinite time will seek to acquire, for its own use, by condemnation proceedings, the title to the land."

In the cited case the City had an interest in maintaining the *status quo* just as petitioner may have an interest in maintaining the *status quo* until it acquires some rights cognizable in equity, but that interest is insufficient to make petitioner a "party in interest" for the purpose of maintaining an injunction suit under paragraph (20).

If respondent's track be an extension as contended by petitioner, the preservation of the *status quo* is unnecessary to protect petitioner. Paragraph (18) prohibits operation of an extension without a certificate from the Commission as well as the construction of an extension without such certificate. If petitioner ever constructs its railroad and respondent is then unlawfully operating its track, petitioner may then institute suit under paragraph (20) to enjoin such unlawful operation.

4. The Construction of "Party in Interest" by the Circuit Court of Appeals Is in Accordance With the Purpose and Policy of Paragraphs (18) to (21) of Section 1 of the Interstate Commerce Act.

In *Low Wah Suey v. Backus,* 225 U. S. 460, 475, this Court held that "all statutes must be given a reasonable construction with a view to effecting the objects and purposes thereof." When the provision of paragraph (20) providing for an injunction is considered in the light of the Congressional purpose and policy underlying paragraphs (18) to (21) of Section 1, it is clear that this injunction proceeding was authorized for the purpose of protecting rights and therefore anyone without existing rights to protect is not a "party in interest." The injunction provision was not authorized for the purpose of prohibiting violations of law but for the purpose of protecting rights in accordance with established principles of equity. The end sought is the protection of rights and the injunction suit is the means provided for obtaining that protection. The

end sought is clearly not the prohibition of violations of the statute.

In *Colorado v. United States,* 271 U. S. 153, 162, this Court held that the certificate required under paragraphs (18) to (20) of Section 1 issues primarily to protect interstate commerce. It also appears from the decision of this Court in *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.,* 270 U. S. 266, 277, that the purpose and policy of these paragraphs are to protect the public from burdens and losses resulting from the building of unnecessary lines and from unwarranted competition. In other words, the primary purpose of these paragraphs is to protect the interests and rights of the public with respect to these instrumentalities of interstate commerce.

The provision for an injunction in paragraph (20) is part and parcel of the purpose and policy of Congress as embodied in these several paragraphs and therefore the several paragraphs must be construed as a whole. Since the purpose is primarily to protect the rights of the public, it follows that it was the intention of Congress that the provision for an injunction is primarily for the protection of those rights.

Congress, while providing means whereby the rights of the public might be protected from unnecessary construction and unwarranted competition, also provided secondarily for the protection of the rights of individuals or corporations by authorizing any "party in interest" to maintain a suit for injunction against un-

authorized construction for the purpose of protecting existing rights. There was no intention on the part of Congress to subvert established principles of equity governing injunction proceedings where individuals or corporations, apart from the public, are concerned by authorizing them to maintain suits for injunction where unnecessary to protect rights.

When the provision for an injunction in paragraph (20) is considered in the light of this Congressional policy and purpose, the meaning and scope of the words "party in interest" become clear. If one railroad attempts to construct an unauthorized extension of its line into territory already served by another railroad and thus subjects that railroad to existing or presently threatened injury, the second railroad is a "party in interest" within the meaning of those words as used in paragraph (20) and may maintain a suit in equity to enjoin the unauthorized or unlawful construction.

5. Under the Meaning Attributed to "Party in Interest" by the Circuit Court of Appeals, Statutory Authorization Is Not Surplusage.

Counsel for petitioner argue that if a party in interest must have some independent right of its own which is threatened with injury, such conferring of statutory authority would be wholly unnecessary and pure surplusage (petitioner's brief, p. 13 *et seq.*), since "*A party having an independent legal right of its own* may protect it by injunction when necessary, *without any statutory authorization*" (petitioner's brief, p. 14).

Such an argument affords no basis for the construction proposed by petitioner and has no significance so far as the correctness of the decision of the court below is concerned. It is not unusual for legislative bodies to enact statutes declaratory of the existing rule. Thus, Section 267 of the Judicial Code (U. S. C. A., Tit. 28, Sec. 384) provides:

> "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

In *Scott v. Neely*, 140 U. S. 106, 110, this Court held that this section introduces no new principles of equity jurisprudence, but is merely declaratory of the rule obtaining in equity proceedings from the earliest period in England and always in this country. This is one of the most elementary principles of equity jurisprudence. Also, in *American Foundries v. Tri-City Council*, 257 U. S. 184, this Court in construing Section 20 of the Clayton Act, held (p. 203):

> "It is clear that Congress wished to forbid the use by the Federal Courts of their equity arm to prevent peaceful persuasion by employees, discharged or expectant, in promotion of their side of the dispute, and to secure them against judicial restraint in obtaining or communicating information in any place where they might lawfully be. This introduces no new principle into the equity jurisprudence of those courts. It is merely declaratory of what was the best practice always. Con-

gress thought it wise to stabilize this rule of action and render it uniform."

It cannot be questioned that the United States under its power to regulate interstate commerce and its obligation to promote the interest of and protect the public in interstate commerce could, without any statutory authorization, maintain a suit for injunction to prevent railroads from constructing unauthorized extensions of line contrary to the purpose and policy of the United States as declared in statutes. In *Sanitary District v. United States,* 266 U. S. 405, 425, 426, this Court held that the United States under its sovereign power to regulate interstate commerce has a standing in a court of equity to remove obstructions to interstate commerce; that the Attorney General by virtue of his office may bring this proceeding; and that no statute is necessary to authorize the suit. See also *In re Debs, supra,* p. 584 *et seq.*

Congress, however, preferring that the Interstate Commerce Commission rather than the Attorney General should be entrusted with the duty of instituting injunction proceedings to protect the public against unauthorized railroads, so provided in paragraph (20). Had Congress provided that suit could be maintained by the Interstate Commerce Commission without making any provision for such a suit by a "party in interest", such a "party in interest" could not maintain a suit for injunction against unauthorized construction even though such a party would be injured by such un-

business and has a standing in a court of equity for injunctive relief against unlawful injury or interference.

Liggett Co. v. Baldridge, 278 U. S. 105, 111;
Truax v. Corrigan, 257 U. S. 312, 327;
Duplex Printing Press Co. v. Deering, 254 U. S. 443, 465.

In *People's Transit Co. v. Henshaw,* 20 F. (2d) 87, 90, certiorari denied, 275 U. S. 553, it was held that receivers operating a street railway system, the revenues of which were directly affected by the operation of bus lines in violation of a city ordinance, have such a property interest as to justify an injunction restraining the bus lines from operating.

The rule followed in *People's Transit Co. v. Henshaw, supra,* has been applied in a number of cases, among which are the following:

Featherstone v. Independent Service Station Association (Tex. Civ. App.), 10 S. W. (2d) 124;
Brooklyn City R. Co. v. Whelan, 199 App. Div. 737, 182 N. Y. Supp. 283, affirmed in 229 N. Y. 570;
Puget Sound Traction Co. v. Grassmeyer, 102 Wash. 482, 173 Pac. 504;
Memphis Street Railway Co. v. Rapid Transit Co., 133 Tenn. 99, 179 S. W. 635;
N. Y. etc. Ry. Co. v. Deister, 253 Mass. 178, 148 N. E. 590;

Lincoln Traction Co. v. Omaha etc. Co., 108 Neb. 154;

Bartlesville Electric Light & Power Co. v. Bartlesville Interurban R. Co., 26 Okla. 453.

Under the principle applied in these cases, the Texas & Pacific had an independent existing right which it was entitled to protect against unlawful invasion to its injury and it had all the qualifications necessary under established principles of equity to enable it to enjoin the Santa Fe from constructing its railroad and taking away that business to the injury of the Texas & Pacific.

There is nothing in *Pennsylvania Railroad Company v. United States*, 40 F. (2d) 921, to the contrary. That case involved a suit to set aside an order of the Interstate Commerce Commission authorizing another railroad carrier to extend its line into territory then exclusively served by the Pennsylvania. The case was decided in accordance with the familiar principle that, as against the United States, one carrier has no such property interest in its territory and business as would permit it to enjoin another carrier from coming into and serving the same territory under authority from the United States.

The *Pennsylvania Case* has no bearing on the question under consideration.

In the case at bar, the Southern Pacific Company (respondent) is already serving the territory involved. It is seeking to build an industrial spur or switching

track upon a tract of land containing 500 acres immediately adjacent to its main line right of way which constitutes a part of the territory served by it for many years. Petitioner has no right of way, it has no railroad, it has no business, and it does not appear from the record whether it will ever have either a railroad or business. There is no showing that the construction of respondent's proposed industrial spur or switching track will injure petitioner even if petitioner ever builds its railroad and secures a business. In fact counsel for petitioner admit: *"we have never claimed that petitioner ever had any existing legal right invaded or threatened"* (petitioner's brief, p. 26; emphasis ours).

It is argued by counsel for petitioner that "this Court has already defined the term 'any party in interest' as used in an analogous statute (Sec. 212 Judicial Code, now Secs. 44 and 45(a) of Title 28, U. S. C. A., Supp. 1929 thereto) in *Alexander Sprunt & Son, Inc. et al. v. United States, supra"* (petitioner's brief, p. 18). In that case this Court merely held that a competitive advantage enjoyed by the parties was a sufficient interest to enable them to intervene in an administrative proceeding before the Interstate Commerce Commission, and "if they did so, they became entitled under Section 212, Judicial Code, to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission," but that this interest (competitive advantage) alone which was threatened by the order of the Commission was insufficient to entitle them to maintain an inde-

pendent suit to vacate and set aside the order of the Commission.

This case supports respondents' contention that when Congress employed the words "party in interest" in connection with an injunction proceeding, it contemplated that one is a "party in interest" for this purpose only when such party has such an interest as is necessary under established principles of equity jurisprudence to enable the party to maintain an injunction suit. A "party in interest" in an administrative proceeding before the Commission must be one who has such an interest as to entitle him to participate in such administrative proceeding. Under the decision in the cited case a "party in interest" in administrative proceedings does not necessarily have a sufficient interest to make him a "party in interest" in injunction proceedings. The *Sprunt Case* sustains the principle that a party has no standing to maintain an independent suit for an injunction unless some right of his own is being violated resulting in existing or presently threatened injury.

Baltimore & Ohio Railroad Co. et al. v. United States, (Chicago Junction Case), 264 U. S. 258, in no way supports petitioner's construction of "party in interest" as used in paragraph (20). In that case, the Interstate Commerce Commission authorized the New York Central Railroad Company under paragraph (2) of Section 5 of the Interstate Commerce Act to acquire control of the Chicago Junction Railway and the Chicago & Indiana Railroad, terminal railroads

located within the Chicago switching district. Suit was brought by other railroads to enjoin this acquisition. This Court held that carriers are entitled to equality of treatment under the Interstate Commerce Act as fully as shippers; that as a result of this acquisition plaintiffs were subjected to irreparable injury, the loss sustained exceeding $10,000,000; that this loss was not an incident of more effective competition but an injury inflicted by denying to the plaintiffs equality of treatment; and that the plaintiffs, therefore, had the legal interest necessary to entitle them to challenge the order.

In the cited case, plaintiffs, under the law, had a right and this right was being invaded to their injury. Plaintiffs, therefore, had the requisites necessary under equity jurisprudence to enable them to maintain a suit for an injunction. The cited case differs from the case at bar in that in the latter case petitioner has no existing right and it necessarily follows that there can be no injury to a right not in existence.

7. This Court May Consider Subsequent Events in Making Such Disposition of the Case as Justice at This Time May Require.

In *Watts, Watts & Co. v. Unione Austriaca etc.*, 248 U. S. 9, this Court held (p. 21):

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time

require. *Butler v. Eaton,* 141 U. S. 240; *Gulf, Colorado & Santa Fe Ry. Co. v. Dennis,* 224 U. S. 503, 506. And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below. *United States v. Hamburg - Amerikanische Packetfahrt - Action Gesellschaft,* 239 U. S. 466, 475, 478; *Berry v. Davis,* 242 U. S. 468; *Crozier v. Krupp,* 224 U. S. 290, 302; *Jones v. Montague,* 194 U. S. 147; *Dinsmore v. Southern Express Co.,* 183 U. S. 115, 120; *Mills v. Green,* 159 U. S. 651; *The Schooner Rachel v. United States,* 6 Cranch 329; *United States v. The Schooner Peggy,* 1 Cranch 103, 109-110."

Subsequent to the decision of the Circuit Court of Appeals and again after this Court had granted a writ of certiorari, the Interstate Commerce Commission, upon application of petitioner, extended the time for the commencement and completion of the construction of petitioner's railroad, finally to January 1, 1932, and to January 1, 1934, respectively. Copies of the Commission's orders are contained in the Appendix hereto.

These subsequent events show that petitioner apparently is not planning to begin the construction of its railroad until nearly three years after respondent began the construction of its spur or switching track on March 23, 1929, and the time of completion is fixed at nearly five years subsequent thereto. The fact that petitioner may have a railroad in the terri-

tory involved in five years after respondent began the construction of its spur or switching track, certainly is not evidence of a sufficient existing interest to make petitioner a "party in interest" within the meaning of those words as used in paragraph (20) of Section 1. It may be that petitioner will secure further extensions of time or not build its railroad at all. These possibilities show the speculative and conjectural nature of petitioner's interest.

It may well be that respondent, by the construction of its spur or switching track, might contribute to the development of this territory during this period of years to such an extent that it would be beneficial to petitioner, rather than detrimental, if petitioner should ever construct its railroad.

These subsequent events serve to emphasize the correctness of the decision of the Circuit Court of Appeals in holding that a corporation, having only a projected line of railroad and an application pending before the Interstate Commerce Commission for a certificate of public convenience and necessity, without a railroad, without a right of way, and without traffic to protect, is not a "party in interest" within the meaning of paragraph (20) of Section 1, so as to be entitled to an injunction. Petitioner's interest is unsubstantial, purely speculative and is based upon hope and expectation rather than upon any right.

It is not an interest cognizable in a court of equity as a basis for an injunction and this Court will not

presume that it was the intention of Congress to make such a speculative and conjectural interest sufficient for the exercise of the equity powers of courts in injunction proceedings.

When paragraph (20) is interpreted in the light of established principles of equity jurisprudence as enunciated in the cases herein cited and in the light of the purpose and policy of paragraphs (18) to (21) of Section 1 of the Interstate Commerce Act, its purpose and meaning are clear. Obviously, it was not the intention of Congress to authorize the use of injunction to prevent violations of law or crimes as such. From the standpoint of crimes or violations of law, paragraphs (18) and (19) are to be enforced by fine or imprisonment or both as provided by paragraph (20). Injunction is to be employed to protect the unlawful invasion of existing rights resulting in injury in accordance with established principles of equity jurisprudence.

The rights to be protected are those of the public in interstate commerce on the one hand and of private individuals on the other. The rights of the public are to be protected by the use of an injunction obtained at the suit of "the United States, the Commission, any commission or regulating body of the State or States affected," while the rights of individuals are to be protected at the suit of "any party in interest," that is, of any party who possesses an existing right which may be

invaded by unauthorized construction or operation to its injury, either existing or presently threatened. A "party in interest" may resort to a court of equity for the protection of its rights and it need not rely on designated agencies of the government to act for its protection. Likewise, the designated agencies of the government may resort to a court of equity to protect public rights and need not wait for a "party in interest" to act for the protection of public rights.

By providing that any "party in interest" may maintain a suit to enjoin unauthorized construction or operation, without further defining "party in interest," Congress has clearly indicated that such "party in interest" must meet the requirements usually necessary, under established principles of equity jurisprudence, to entitle a party to protection by the extraordinary and drastic remedy of injunction. In other words, a "party in interest" must have an existing independent right which is being invaded to its injury, either actual or presently threatened.

Petitioner, without a right of way, without a railroad, and without a business to protect, and without showing that it will be injured by the construction and operation of respondent's track, if it should ever have a railroad and a business, clearly has no right, under settled rules of equity jurisprudence to maintain its suit for an injunction.

Petitioner is not a "party in interest" within the meaning of that term as used in paragraph (20) and

it therefore has no standing in equity to maintain its suit for injunction. The decision of the Circuit Court of Appeals is correct and should be affirmed.

As above stated, the sole ground relied upon by counsel for petitioner in their petition for a writ of certiorari was that the Circuit Court of Appeals erroneously decided that petitioner was not a "party in interest" within the meaning of paragraph (20) of Section 1 of the Interstate Commerce Act.

Under the decisions of this Court, cited on page 4 of this brief, it is within the discretion of this Court to limit its consideration of the case to the ground relied on in the petition for the writ, or the Court may consider and dispose of the entire case. The argument following is intended to acquaint the Court with the merits of the main case in the event the Court exercises its discretion to consider and determine the issues of fact and law involved in the question whether respondent's proposed track is a spur or industrial track, excepted from the jurisdiction of the Interstate Commerce Commission by paragraph (22) of Section 1, or whether it is an extension requiring the approval of the Commission.

authorized construction. In *Payne Lumber Co. v. Neal*, 244 U. S. 459, this Court held (p. 471) that Section 4 of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209), in providing for an injunction by the suit of Government officials, impliedly negatived the right of a private person to obtain injunctive relief, even though such private person sustained special injury.

Decorative Stone Co. v. Building Trades Council, 23 F. (2d) 426, 428.

It is clear from these decisions that the statutory authorization is not surplusage so far as a "party in interest" is concerned, even though such "party in interest" must have an independent right of his own which is being invaded to his injury. It is not surplusage so far as the Interstate Commerce Commission is concerned, because in the absence of such statutory authorization the duty of instituting suit for an injunction to protect the public would have rested with the Attorney General. It is not surplusage so far as the state agencies are concerned because the states do not have the power of the United States to protect interstate commerce and they would have been impliedly excluded if they had not been specifically designated.

6. The Decision of the Circuit Court of Appeals is Not in Conflict or Inconsistent With the Decisions of This Court.

Counsel for petitioner contend that the decision rendered by the Circuit Court of Appeals is in conflict with *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa*

Fe Ry. Co., 270 U. S. 266. They argue that "the only injury threatened in that case was a *loss of competitive advantage*" (petitioner's brief, p. 16), and that "The Texas & Pacific Railway Company could *not* have maintained its injunction action under the views expressed by the Circuit Court of Appeals in this case" (petitioner's brief, p. 17). Neither of these contentions is correct.

The *Texas & Pacific Case, supra,* is entirely different from the one at bar. In the cited case the Texas & Pacific Railway was actually serving, under a legal right to do so, the territory involved and it was enjoying a lucrative business therefrom. The Santa Fe was attempting to build an extension of line into the territory served by the Texas & Pacific without securing a certificate of public convenience and necessity, for the purpose of diverting a substantial part of the Texas & Pacific business, necessarily resulting in serious injury to the Texas & Pacific. As against the Santa Fe attempting to serve that territory without compliance with the Act of Congress, but in violation thereof, the Texas & Pacific had a right under the law to that business, it had a property right therein and it was entitled to an injunction against the Santa Fe seeking to invade that right to its injury. This was not a mere competitive advantage enjoyed by the Texas & Pacific but a right to the business as against any other railroad attempting to serve that territory in violation of law.

It is settled that one engaged in a business under a lawful right to do so has a property interest in that

2. Effect to be Given to Special Master's Findings and Conclusions Approved and Affirmed by District Court.

Under Section 240 (a) of the Judicial Code (U. S. C. A. Tit. 28, Sec. 347 (a), which is set out in the Appendix, if this Court considers this phase of the case, it will do so with the same power and authority, and with like effect as if the cause had been brought here by unrestricted appeal.

In *Virginian Railway v. United States*, 272 U. S. 658, this Court held (p. 675):

> "Matters of fact and law are reviewable on appeal in equity."

In *Keller v. Potomac Electric Co.*, 261 U. S. 428, this Court held (p. 447) that in equity procedure:

> "An appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses."

In *Presidio Mining Company v. Overton, et al.*, 270 Fed. 388, 390, Certiorari denied, 256 U. S. 694, the Circuit Court of Appeals for the Ninth Circuit held that upon an appeal in equity, while proper consideration will be given to the findings below, the case is triable *de novo*, especially where the evidence is chiefly documentary and the oral testimony largely uncontradicted. Even

"Where evidence is conflicting and the trial judge has had the opportunity of seeing the witnesses, observing their demeanor, while testifying, judge of their candor and intelligence, and thus be able to determine their credibility and the weight of their testimony, the finding of the trial court is persuasive and presumptively correct, but not conclusive."

In the case at bar, the findings of fact are based upon the pleadings, documents, exhibits, and the uncontradicted testimony of witnesses. It was held in *Presidio Mining Company v. Overton, et al., supra,* (p. 390) that this character of the evidence makes "it the duty of this court to examine the record and find the material facts for itself."

The case at bar presents a situation making it necessary for an appellate court to examine the record and determine the material facts for itself. As above stated, some of the Master's findings of fact which were adopted as those of the District Court, are unsupported by any evidence at all and others are directly contrary to the undisputed evidence, and the Master and Court failed to find certain facts necessary in determining whether the track under construction is an extension or an industrial spur or switching track, notwithstanding the fact that respondent, by exceptions, called attention to the failure to find such facts, and although there is ample evidence in the record to support findings in accordance with respondent's exceptions.

Both the Master and the Court not only misapprehended the evidence but proceeded directly contrary to it, and findings cannot prevail upon clear evidence to the contrary.

3. Statement and Discussion of Facts.

Page 28 of the record is a map showing the general situation. The Emma Rose property is shown lying within the limits of the City of San Mateo and respondent's track is shown leading from its main line of railroad, upon and across the Rose property. It is proposed to construct petitioner's railroad to the east of respondent's railroad and approximately parallel with it (R. 4), that is between respondent's existing railroad and the Bay of San Francisco.

Respondent's authority for expenditure as finally revised, providing for the construction of its track, dated August 6, 1928, and approved September 13, 1928, authorized the construction of 1960 feet of track on the main line right of way (this portion was primarily a facility to the main line operation, R. 164) and 8200 feet of industrial drill track (industrial drill track and switching track are synonymous, R. 249) for the purpose of serving the Emma Rose property for its entire width (Second Revised Authority for Expenditure contained in plaintiff's (petitioner here) Exhibit 5, the original of which has been transmitted to this Court). This track is shown in red on the map attached to the Second Revision of the Authority for Expenditure (plaintiff's Exhibit

5). It is also shown on Exhibit A (R. 28). It was the intention at the time the authority was approved to construct the track of 8200 feet to the extreme eastern boundary of the Rose property, but at the time of the construction it was the intention to construct it only to the San Francisco Bay Toll Bridge Road which was located about 300 feet from the extreme easterly limits of the Rose property (R. 109, 127, 129, 211, 212, 255, and Appendix p. 49 *et seq.*). Mr. Williams, Chief Engineer for plaintiff (petitioner) (R. 82) testified that the survey stakes for the track went to the immediate vicinity of the approach to the toll bridge road (R. 93) and that the survey stakes on the ground indicated a track to the toll bridge road (R. 95). The deed from Emma Rose required the construction of the track only to the southwesterly boundary of the toll bridge road (R. 116). It thus appears that respondent was engaged in the construction of an industrial spur or switching track 7900 feet in length.

Off of respondent's switching track would be a spur, relatively short, but of sufficient length to serve the industry that was proposed to locate or that had located. It would be connected with this switching track at one end by a switch (R. 177). The expense of this short industrial spur is borne largely by the industry (R. 178).

Respondent's track was being constructed in response to a demand from the people of San Mateo, who, having tried to develop their city industrially, found that this could not be done without switching

facilities (R. 231, 232, 241, 242). In developing property industrially switching tracks must be provided first and then industries follow (R. 119, 233, 234). The people of San Mateo insisted that the Southern Pacific (respondent) provide switching facilities (R. 233), and respondent agreed to build a switch track down through the Emma Rose property (R. 234). It is our (respondent's) common procedure to lay down industrial switch tracks at its expense, if the owner of the property which is being developed will contribute the right of way (R. 110). This switch track was being constructed for the sole and exclusive purpose of serving the Rose property consisting of about 500 acres and securing industries on that property (R. 127, 211, 255, 256, Appendix 32, 35, 37).

The territory involved in this proceeding embraces a parcel of land owned by one Emma Rose, containing only about 500 acres (R. 257) lying immediately adjacent to appellant's main line right of way (R. 126) and does not include an area of 23,300 (petitioner's brief, p. 28) acres of new territory not heretofore served by respondent as found by the Master (Appendix 32 *et seq.*). There is in the record evidence (R. 94) that there are 23,300 acres of land and water lying between respondent's railroad on the West and the San Francisco Bay on the East, South San Francisco on the North, and Redwood City on the South, but there is no evidence that respondent's track was being constructed for the purpose of serving that territory. We (respondent) had no expectation of de-

veloping any property adjacent to the Rose property and had not planned or expected to serve or be called upon to serve beyond the Emma Rose property by the Emma Rose industrial switching track (R. 257).

The Emma Rose property is situated within the City of San Mateo (R. 253, Exhibit A, R. 28) and lies immediately adjacent to respondent's main line of railroad, abutting respondent's right of way for a distance of 1907 feet (R. 126), and is a part of the territory served by respondent's railroad since 1863 (R. 126, Appendix 106, *et seq.*). San Mateo, which includes the Emma Rose property, was being served by respondent and by no other common carrier by railroad (Plaintiff's (petitioner here) Exhibit 2, Return to Questionnaire, Question and Answer 11, p. 6, the original of which exhibit has been transmitted to the Court).

In *Western Pacific California Railroad Construction,* 170 I. C. C. 183, the Commission, in granting petitioner authority to construct its proposed railroad, held that all the territory to be served by it was being served by the Southern Pacific Company (respondent). Referring to petitioner's proposed railroad, the Commission said (p. 188):

> "It would serve an area, as stated by the applicant, of about 30,000 acres, in which is a population of some 60,000. This population is now served by the Southern Pacific and includes all the towns on the line of the railroad and all the land

east of the line, much of which is marsh land, and land covered by the shallow water of San Francisco Bay."

Respondent had no intention of extending its track at the easterly end northerly and southerly and approximately parallel with the railroad of petitioner nor in any other direction (Appendix 57 *et seq.*). Mr. Paul Shoup, respondent's president, testified positively and directly that the Southern Pacific Company (respondent) has no intention of extending the track in any direction (R. 211). There is other evidence to the same effect (R. 161, 181) and there is no evidence to the contrary. As above pointed out, the survey stakes on the ground, as found by the Chief Engineer of petitioner, indicated that the track would be built upon and across the Rose property to the southwesterly boundary of the toll bridge road (R. 92, 95) which was 300 feet less than the entire width of the Rose property (R. 109). Respondent does not look for any industrial development outside of the Emma Rose property for a long time to come (R. 123). Notwithstanding this direct and positive evidence to the contrary, the Master found (R. 42) that it was respondent's purpose to extend this track "at the easterly end northerly and southerly and approximately parallel with the railroad of the plaintiff (petitioner)," and counsel for petitioner argue that this finding has sufficient support in the evidence and that "there has been no claim made by respondent that its proposed trackage would not be used for ser-

vice anywhere in the territory involved (referring to the 23,300 acres) in this suit by means of extensions therefrom north or south or in any other direction", (petitioner's brief, p. 31).

Respondent's track was being constructed in accordance with the policy and practice of constructing industrial spurs and switching tracks by respondent and other California carriers, including the Western Pacific Railroad, since 1920 (R. 249, 250, 251, Appendix 93 *et seq.*). Since 1920, the Western Pacific, in addition to constructing other such industrial switching tracks as is involved in this case, built a long track which they considered a spur track, from off their main line just north of the city limits of Stockton, California, swinging around the City of Stockton to the north, to the west and thence turning east and serving the north side of the Stockton Channel. This track is approximately six miles long (R. 250, 251). None of the carriers interested in any of these facilities applied to the Interstate Commerce Commission for a certificate of public convenience and necessity under the provisions of paragraph (18) Section 1, of the Interstate Commerce Act (R. 250). Petitioner is a subsidiary of the Western Pacific (R. 284). In *Western Pacific California Railroad Company Construction, supra,* the Commission, referring to the proposed line of petitioner, said (188):

> "The proposed line is to be built and operated by the new company, a wholly owned subsidiary of the Western Pacific, in order to secure short-

line divisions of through rates, and thus help the parent company bear the burden of the expense of the new construction."

Exhibit L (R. 273) reflects typical industrial switching tracks that have been constructed by Southern Pacific Company (respondent here) subsequent to 1920, without a certificate of authority from the Interstate Commerce Commission (R. 275).

Respondent was attempting to construct its switching track with expedition and without publicity (petitioner's brief, p. 35) because of anticipated opposition from the City Manager of San Mateo (R. 168). Respondent's fears were fully justified, because the City Manager secured an injunction stopping the work, which injunction was based on a misstatement of facts, and after the injunction was issued he sent out his men to make certain alleged facts correct and to construct a sewer line. When these facts were brought to the attention of the Mayor and City Council the injunction of the City of San Mateo was withdrawn (R. 170). Respondent anticipated no opposition from petitioner because respondent thought that a provision in the Emma Rose deed protected petitioner to its satisfaction (R. 149). The deed from Emma Rose, granting right of way to respondent was accepted upon the express condition that respondent would not oppose the crossing of its track by the proposed line of railroad to be constructed by petitioner (R. 139).

The fact that respondent's forces worked on Sunday (petitioner's brief, p. 35) was due to a misunderstanding (R. 151, 152). Mr. Kirkbride, under whose supervision this work was being done, on Monday, March 25, 1929, the day after respondent's forces worked on Sunday, and before petitioner's injunction proceedings were instituted, instructed Mr. Mathews, in charge of respondent's forces, that he did not want any more Sunday work (R. 195).

On page 35 of their brief, counsel for petitioner describe respondent's construction, stating that respondent had laid a track across the Bayshore Highway. There was no Bayshore Highway and the State at that time owned no right of way therefor across the Emma Rose property (R. 280).

Respondent's track was only partially completed at the time of the institution of injunction proceedings (petitioner's brief, p. 35), but this indicates nothing unusual about the construction. Mr. Williams, Chief Engineer for petitioner (R. 83), described respondent's track so far as constructed, but he did not testify and petitioner introduced no evidence that respondent's methods or manner of constructing its track were contrary to good engineering practice. It is significant that, while Mr. Williams described the partially completed track in considerable detail (R. 89 *et seq.*) he did not testify that the construction was at all unusual, considering the necessity for expedition and modern methods of construc-

II.

RESPONDENT'S PROPOSED CONSTRUCTION DOES NOT CONSTITUTE AN EXTENSION OF ITS LINE WITHIN PARAGRAPHS (18) TO (20) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT BUT AN INDUSTRIAL SPUR OR SWITCHING TRACK AS DEFINED BY PARAGRAPH (22) OF SECTION 1 OF THAT ACT AND RESPONDENT IS NOT REQUIRED TO OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FROM THE INTERSTATE COMMERCE COMMISSION.

1. Statement.

A consideration and determination of the question whether respondent's proposed track is an extension as defined by paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act or an industrial spur or switching track as defined by paragraph (22) of that section involve a number of questions of fact and of law.

The matter was referred to a Special Master to take evidence and report his findings of fact and conclusions of law. A number of the Master's findings of fact which were adopted as those of the District Court do not correctly reflect the evidence contained in the record, and his conclusions of law based thereon are erroneous. Some findings are unsupported by any evidence at all and others are directly contrary to the evidence. Also, the Master and the Court failed to find certain facts material in determining whether the track under construction is an extension or an industrial spur or switching track, although respondent

(defendant) by exceptions, called attention to the failure to find such facts and although there is ample evidence in the record to support findings in accordance with respondent's exceptions.

The action of the District Court in overruling respondent's exceptions and in confirming the Master's erroneous findings of fact and conclusions of law was assigned as error by respondent (appellant) in its appeal to the Circuit Court of Appeals. The questions of both fact and law were discussed fully in the brief filed by respondent in that Court. In that discussion respondent set out fully the Master's findings, respondent's exception thereto and a digest of the evidence showing that the particular finding was contrary to the evidence.

Counsel for respondent will not attempt to discuss fully these questions of fact in the body of this brief. That portion of the brief dealing with such questions of fact filed in the Circuit Court of Appeals is set out in the Appendix hereto as a part of this brief. (The page numbers of this portion of Appendix are the same as in the original brief).

When any fact included in the statement of facts, *infra*, differs from the Master's finding, reference will be made to that portion of the Appendix containing the Master's finding, respondent's exception thereto and a digest of evidence thereunder.

tion. Mr. Williams is an engineer of considerable experience (R. 82) and if there had been anything unusual or contrary to good construction practices, he would undoubtedly have pointed out why and in what respect the methods of construction did not conform to good construction. He merely described the partially completed track in its then existing state without in any way attempting to criticize the methods of construction, leaving it to the uninformed to infer that there was something unusual about the methods of construction.

It may be justly inferred that Mr. Williams was not in a position to combat respondent's evidence that considering the problem involved a very good way was worked out there in connection with building this track (R. 186).

Mammoth Oil Co. v. U. S. 275 U. S. 13, 52.

It was respondent's intention to lay this track on the surface of the ground, pick it up only sufficiently to give it a good running surface until such time as the manager of the Emma Rose property could definitely state the grade line he wanted (R. 150). The deed from Emma Rose granting the right of way for respondent's track (Plaintiff's (petitioner here) Exhibit 7, the original of which has been transmitted to this Court) contains the following provision as a condition (p. 4):

"That the grade or grades of the railroad track or tracks on the parcel of land above described,

and the elevation of said track or tracks shall be such as to best serve the land as it now is for industrial purposes, and the elevation of such track or tracks to be constructed on said parcel of land hereinabove described shall be subject to the approval of the grantors; and in the event the grantors fill their land adjoining said parcel of land above described, the grantee will, upon receipt of written notice from the grantors, raise said track or tracks and fill the parcel of land above described to the same level of the adjoining land of the grantors."

Respondent's track, when constructed, will be operated in the same manner as other industrial tracks, will be used exclusively for switching carload freight from and to industries and will have none of the attributes or characteristics of main or branch lines (109, 123, 128, 248, 254, Appendix 100 *et seq.*)

Respondent's proposed track is to be used for one specific purpose, namely the switching of loaded and empty cars to and from the industries that may locate adjacent to it (R. 109, 123, 124, 128, 175). The service to be given and the manner of giving that service will be as set out in the quotation beginning on page 37 of petitioner's brief.

Obviously this switching service, such as respondent will perform on this track is not the same service in substance as respondent performs over its existing main lines of railroad, counsel's suggestion to the

contrary notwithstanding (petitioner's brief, p. 38). Certainly, there is no evidence or suggestion in the record to that effect.

The net cost of respondent's track, including the 1960 feet of track on respondent's main line right of way, is $73,160 (R. 102), and not $73,160 for 8200 feet of track as appears on page 27 of petitioner's brief. Subsequent to the institution of this injunction proceeding the California Railroad Commission conducted an investigation of the proposed crossing of the proposed State Highway by respondent's spur track (R. 279). The Commission held that, while it could not recognize the mere intention of the State to construct a highway as constituting a public road, it would nevertheless dispose of the matter, since both parties, that is respondent and the Department of Public Works of California, had submitted the matter to the Commission for decision (R. 281, 282). The Commission held that a grade separation could be constructed at a cost ranging between $75,000 and $115,000, (R. 282), one-half of which respondent should pay and the Department of Public Works the other half (R. 284). In its consideration and disposition of the matter, the Commission recognized that respondent was engaged in the construction of a spur track into the Emma Rose property to develop that property for industrial purposes and that respondent's operations over the track would be switching (R. 279-283, inclusive).

The character of the construction of respondent's track conforms to its usual method of constructing spur tracks. The rail was to be second-hand 90-pound rail, released from the main line. It is our (respondent's) policy to wear out the rail in the main line and when it is ready to be removed, it is taken up and used for yard, siding, and spur-track construction (R. 166).

4. Comments on Petitioner's Statement of Facts and Evidence.

On page 31 of petitioner's brief, following the statement that "'There has been no claim by respondent that its proposed trackage would not be used for service anywhere in the territory involved in this suit (meaning 23,300 acres and not 500 acres) by means of extensions therefrom north or south or in any other direction,'' it is stated that "'The general manager (Mr. F. L. Burckhalter) of respondent was entirely frank in his testimony as to the use to which the trackage to be immediately constructed was to be put,'' and there follows several quotations from the evidence contained in the record purporting to sustain this statement as to use of the track to serve 23,300 acres.

Mr. Burckhalter was called as a witness by plaintiff (petitioner) (R. 100) and counsel for petitioner examined him at some length as to the possibility or probability of extending respondent's track for the purpose of serving industries to be located on properties other than the property of Emma Rose. The

speculative nature of this testimony is shown by the quotations included in petitioner's brief on pages 31 to 33, inclusive, as well as by some portions omitted as indicated by stars and some portions not quoted.

On page 32 following "stars" it is stated that "the track that we are discussing (the Rose track) might be turned to the right and serve the property along Brewers Island". The entire statement with respect to Brewers Island is as follows (R. 118):

> "I don't know the property known as Brewers Island except in a very general way. I am not familiar with the name or limits of ownership. As far as I know our company has not been consulted with regard to supplying railroad service for that land. It might have been without my knowledge. The track that we are discussing (the Rose track) might be turned to the right and serve the property along Brewers Island."

Following the quotation ending near the top of page 33 of petitioner's brief, the record contains the following (R. 119):

> "I could not now say just what the limits would be that might or might not be served by this Rose track. I think it is all speculative."

After being lead by counsel for petitioner to speculate as to how and in what manner the proposed switching track on the Rose property might be extended to serve other properties, respondent's general

manager stated the purpose of respondent's switching track (R. 123).

> "Our expectation is that the track will serve industries that may develop on the Emma Rose property."

Then follows the portion quoted in petitioner's brief (p. 33):

> "We do not look for any industrial development outside of the Emma Rose property for a long time to come. If there is industrial development, however, on other properties, we would expect to serve the adjacent properties industrially over this track if that proved to be a convenient and economical way of doing so."

That counsel was leading officers of respondent to speculate as to what might or might not be done with respect to extending respondent's track for the purpose of serving other property as well as the Emma Rose property is shown by the last quotation on page 33 of petitioner's brief from the testimony of Mr. McGanney, Assistant to the Freight Traffic Manager of respondent, who was called as a witness by petitioner (R. 245). The speculative nature is shown more fully by the entire quotation which is as follows (R. 258):

> "If the construction of a deep water terminal should take place my company would expect to serve such terminal or industrial development in whatever manner happened to be the most economical and efficient way of doing it and if the closest piece of track to serve such development

was the Emma Rose track, then that track might be used. *That would have to be determined by the engineering situation.* Whatever appeared to be the most desirable, economic and proper thing to do would probably be done. *I am unable to imagine at this time or to contemplate anything of the sort."* (Italics indicate parts omitted or not quoted.)

The same witness stated the purpose of respondent's track (R. 255, 256):

> "The plan as I have always understood it and heard it discussed was that we would serve the property of the Emma Rose estate and develop it industrially."

His positive testimony shows that there was no intention of developing other property (R. 256):

> "We have no expectation of developing any property adjacent to the Rose property."

It also shows that respondent was not planning to serve other property by its track (R. 257):

> "We have not planned, nor do we expect to serve or be called upon to serve, property beyond the Emma Rose property by the Emma Rose industrial switching track."

Notwithstanding this positive evidence that the track was being constructed for the sole purpose of serving the Rose property and the testimony of Mr. Burckhalter, respondent's general manager, that "it was

proposed to extend this track upon the Rose property to the southerly line of the Toll Bridge Road for the sole and exclusive purpose of developing an industrial area upon the Rose property (R. 127), and the positive testimony of Mr. Shoup, respondent's President, to the same effect (R. 211), counsel for petitioner states (petitioner's brief, p. 34):

> "There was no expression whatever from any Southern Pacific officer or any other person that tended to indicate that it was not the intention of respondent to use the Rose trackage in any way that might be found desirable for the service of industries anywhere within the limits of the territory involved in this action, as such territory was found to be by the Special Master (the territory found by the Special Master to be involved was 23,300 acres)."

Obviously, this conclusion is contrary to direct and positive evidence in the record.

On page 46 of petitioner's brief the Emma Rose property is referred to as extending "miles to the Bay of San Francisco." It is sufficient to say that respondent's 8,200 feet of track would extend from the westerly limits of this property to the extreme easterly limits. By referring to the map contained in the record (R. 28), it will be seen that the 8,200 feet is not a straight line but has a curve in it.

6. Whether Respondent's Track Is an Extension or Not Must be Determined With Reference to the Track Respondent Was Constructing and Not With Reference to the Possibility of Extending This Track.

The position of counsel for petitioner that respondent's track is an extension of line within paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act, is based not upon the fact that the particular track itself is an extension of line but upon the fact that the track plus the possibility of extending it made the switching track an extension of line. It was on this basis or theory that this case was decided in the District Court. In the final decree entered herein by the District Court enjoining respondent from constructing its track the Court refers to the initial 8,200 feet of respondent's proposed track (R. 62).

Counsel for petitioner in their brief (p. 27) refer to "the proposed line of respondent to be immediately constructed would be approximately 8,200 feet in length," and on page 28 reference is made to "the Rose property, to which respondent claimed in the lower Court that its immediate construction would be confined."

On page 34 counsel for petitioner argue:

> "There was no pretense that the authority for expenditure under which this construction was being had forecloses such use, or precluded the construction of any extension thereof under future authorities for expenditure as may be deemed desirable."

Here again counsel deal with the possibility of extension under future authorities.

Undoubtedly respondent's switching track could be extended so that the whole track as extended would constitute an extension of line within the meaning of paragraphs (18) to (20). This question, however, must be determined with reference to the track actually being constructed and not with reference to what additional trackage respondent might or could at some time in the future construct. Its industrial spur or switching track is not made an extension of line because it could possibly be extended at some time in the future so as to become an extension of line. Obviously every industrial spur or switching track could be extended sufficiently to make it an extension of line. It is possible to extend this industrial switching track across the entire United States.

The decision of this Court in *Cleveland, etc. Railway v. United States*, 275 U. S. 404, is authority for the proposition that the possibility of extending an industrial spur or switching track so as to make such industrial spur or switching track an extension of line does not make such industrial spur or switching track an extension of line within the meaning of paragraphs (18) to (21) of Section 1 of the Interstate Commerce Act.

In the cited case a coal company had built a private track about three and one-half miles long from its line to the right of way of the Big Four Railroad. Upon

application by the coal company, the Interstate Commerce Commission ordered the Big Four to construct, maintain and operate the necessary switch connection with the coal company's track, and suit was instituted to enjoin the order of the Commission.

The coal company's track crossed two other railroads at grade and there was an agreement between the two other railroads and the coal company under which trains from these other lines could pass over the track by means of appropriate switch connections which it was physically possible to make and thus tap territory tributary to the Big Four. It was argued that, because of the possibilities of the use of the track by these other carriers, it was an extension within the meaning of paragraph (18) and that the Commission's order was void for non-compliance therewith.

This Court held (p. 410):

> "But no such connection has been made or attempted or threatened; and neither the Illinois Commerce Commission nor the Interstate Commerce Commission has authorized such connection or use. If the track is used by the Illinois Central or the Southern Illinois in the manner described, paragraph 20 of Sec. 1 furnishes the appellant with an appropriate remedy. *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., supra.*"

In the cited case, the possibility of use had materialized to the extent of an agreement under which the

additional use could be realized, but this Court, notwithstanding the agreement, held that no connection had been attempted or threatened, and that the possibility of use did not make the track an extension within the meaning of paragraph (18). Since that paragraph applies to construction as well as to operation (use), obviously the possibility of extension (assuming that construction of respondent's track beyond the Rose property would be an extension) does not make respondent's industrial spur or switching track an extension of its line, and the possibility of extending the spur track so as to make it an extension affords no basis for an injunction restraining respondent from constructing its industrial spur or switching track. If respondent should in the future engage in, attempt, or threaten, such additional construction as would make of its industrial spur or switching track an extension of its line of railroad, petitioner would then, if it had in the meantime acquired sufficient right to make it a party in interest, have an appropriate remedy under paragraph (20) of Section 1.

6. Under the Test Laid Down in the Texas & Pacific Case, 270 U. S. 266, Respondent's Track Does Not Constitute an Extension of Its Line of Railroad Within the Meaning of Paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act But an Industrial Spur or Switching Track Within the Meaning of Paragraph (22) of That Section.

Respondent is not, as suggested by counsel for petitioner (petitioner's brief, p. 52) "attempting to obtain a modification of the views expressed in the *Texas*

& Pacific opinion, which would have the effect of rendering said paragraphs (18) to (21) ineffective to accomplish the purpose of their enactment." Respondent is seeking no modification of the views of this Court as expressed in that case, but respondent is asking this Court to give effect to paragraph (22) of Section 1 in accordance with the intent and purpose of that paragraph. Paragraph (22) provides as follows:

> "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State."

It is respondent's contention that a consideration of the facts in the case at bar in the light of the facts in the *Texas & Pacific Case, supra,* and the principles announced by this Court therein, shows conclusively that this case is governed by the provisions of paragraph (22) and that paragraphs (18) to (20) are inapplicable. This Court held (pp. 277-279):

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning

capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *The New England Division Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission v. Southern Pacific Co.*, 264 U. S. 331. The Act sought, among other things, to avert such losses.

"When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks * * * to be located wholly within one State.' Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover,

the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the federal commission issues its certificate that public necessity and convenience require its construction."

The sum and substance of the rule announced by this Court in the cited case is that, what was ordinarily an industrial spur or switching track prior to the enactment of paragraphs (18) to (22) inclusive of Section 1 of the Interstate Commerce Act is an extension of a line of railroad under paragraph (18) of Section 1 of that Act if the purpose and effect of the new track is to extend a line of railroad substantially into new territory or into territory already served by another railroad. Stated differently, a track falling within the

classification of industrial spur or switching tracks prior to the enactment of paragraphs (18) to (22) is still an industrial spur or switching track within the meaning of paragraph (22), if the purpose and effect of the track is neither to extend a line of railroad substantially into new territory nor to extend it into territory already served by another carrier.

It cannot be questioned that respondent's track is what was ordinarily an industrial spur or switching track prior to the enactment of paragraphs (18) to (22), inclusive, of Section 1 of the Interstate Commerce Act. Industrial spur or switching tracks are defined or described in *Associated Jobbers of Los Angeles v. The A. T. & S. F. Ry. Co., et al.* (Los Angeles Switching Cases), 18 I. C. C. 310, by the Interstate Commerce Commission as follows (312):

> "These industry spurs vary in length, some leading directly from the main track into or alongside of the industry served, while others are of a greater length and branch at one or more points, short spurs running off from what is known as a 'lead' to serve other industries in the immediate neighborhood."

This same language was used by this Court in defining and describing industrial spur or switching tracks in the *Los Angeles Switching Case*, 234 U. S. 294, 306, in which case this Court upheld the decision of the Commission.

The tracks in that case varied from one-fifth of a mile to seven miles in length. In this case the length of the industrial spur or switching track, as authorized by the last revision of the authority for expenditure, is 8,200 feet. The track actually being constructed was several hundred feet less than this due to the fact that it was not to be constructed further than the southwesterly boundary of the San Francisco Bay Toll Bridge road.

Respondent's track is an industrial spur or switching track within the definition of the Commission and of this Court, particularly that portion which says "others are of greater length and branch at one or more points, short spurs running off from what is known as the 'lead' to several other industries in the immediate neighborhood." The track which respondent was engaged in constructing was the "lead" or "drill" track from which short spurs are to be built to serve the individual industries locating, or to be located, adjacent to the "lead."

The Commission said further in the *Los Angeles Switching Cases* (p. 313):

> "There are literally hundreds of thousands of such tracks in this country. We have knowledge sufficient on which to base the conclusion that without such industry tracks the carriers of the country at large would be utterly lacking in adequate terminal facilities. For forty years and more it has been the policy of the railroads to develop traffic and facilitate its movement by the

construction of such spur lines, and so extensive has become this method of direct delivery by rail that it is difficult to conceive of any system which might be devised for conducting the vast volume of our heavy traffic without the spur track, which serves the elevator, the coke oven, the coal tipple, the sawmill, the factory, the blast furnace, the stone quarry, and the jobbing house. In view of these conditions it would be manifestly unfair to treat the industrial spur as a plant facility, a shipper's convenience; it is in fact a necessity to both the carrier and the shipper under modern conditions of business and transportation."

The facts in the case at bar show that respondent's track was being constructed in accordance with the policy of railroads referred to by the Commission of building such tracks for the purpose of developing traffic and facilitating its movement. The record in this case also shows that these industrial spurs or switching tracks must be provided before the location of the industries. Industries must be assured of switching facilities prior to location.

Unless therefore the purpose and effect of respondent's track is to extend its line of railroad into territory already served by another carrier, or to extend its line of railroad substantially into new territory, it is not an extension of its line within paragraphs (18) to (20) but it is still an industrial spur or switching track within paragraph (22).

The purpose and effect of respondent's track is not to extend its line substantially into new territory, here-

tofore served by respondent, but to serve industrially the Emma Rose land containing about five hundred acres, which lies immediately adjacent to respondent's main line right of way and which is and has been a part of the territory served by respondent for many years and by no other common carrier by railroad. The record shows that in petitioner's application to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing it to construct its proposed line, petitioner admitted that San Mateo, of which the Rose property is a part, is served by respondent and by no other common carrier by railroad (plaintiff's (petitioner here) Exhibit 2, Return to Questionnaire, Question and Answer 11, p. 6, the original of which has been transmitted to this Court). Also, in *Western Pacific California Railroad Co. Construction, supra,* in which case the Commission authorized petitioner to construct its proposed railroad, the Commission found (p. 188) that all the population and territory which petitioner proposes to serve was being served by the Southern Pacific Company (respondent). Petitioner has no railroad in the territory in question and it does not appear when, if ever, it will have a railroad in that territory.

A comparison of the facts in the *Texas & Pacific Case, supra,* with those of the case at bar, so far as the track itself is concerned, shows that the track in this case is entirely different from the trackage in the cited case. The findings of the Master in that case are set forth in *Lancaster, et al. v. Gulf, Colorado & Santa*

Fe R. Co., 298 Fed. 488, 492. This report shows that the following trackage was to be constructed (p. 493):

> "The proposed tracks will consist of a main line track, 7½ miles in length, with connections in the nature of a Y at Hale, two storage, assembling, or side tracks at Hale, two side tracks of 1,200 and 1,500 feet in length in the neighborhood of the industries, and five spur tracks connecting this main line with the tracks located at the various industries. The main line, connecting tracks, storage tracks, sidings, and spurs are shown in color on the map marked 'Exhibit 1—Merritt,' filed herewith. The spurs to be constructed by the Santa Fe Railway will connect with existing tracks now owned by the various industries located at their plants."

In the case at bar an industrial spur or switching track less than 8,000 feet in length will be constructed from a connection with appellant's main line upon and across the Emma Rose property to the southwesterly boundary of the San Francisco Bay Toll Bridge Road. From this spur track short individual industrial tracks will be built to the industries to be located adjacent to the industrial spur or switching track. These industrial tracks will be constructed largely at the cost of the individual industry.

Respondent's existing main line of railroad through San Mateo compares with or corresponds to the Santa Fe main line track 7½ miles in length. The industrial spur or switching track to be constructed on the

Emma Rose property compares with or corresponds to the "five spur tracks connecting this main line with the tracks located at the various industries." The individual industrial tracks to be built off of respondent's industrial spur or switching track to the individual industries compares with or corresponds to "the tracks located at the various industries" in that case. Had the Supreme Court been considering only the five spur tracks connecting with the 7½ miles main line of the Santa Fe and not this main line as well, the situation would have been the same as that presented in this case, except that the spur tracks in that case were being built to serve industries already served by the Texas & Pacific, while in this case the spur or switching track is not being built to serve industries already served by another carrier.

A comparison of the facts in the *Texas & Pacific Case* with those of the case at bar, so far as the purpose and effect of the tracks are concerned, shows that the two cases are entirely different. In the cited case the Santa Fe was constructing its track to span the intervening territory for a distance of 7½ miles in order to reach "the richest producing territory in all Texas" which had been developed by the Texas & Pacific and which at that time, and for many years had been, adequately served by the Texas & Pacific. The primary object of this line was to divert from the Texas & Pacific a substantial part of its lucrative business from this rich freight producing territory, and this would necessarily have reduced the earning

capacity of the Texas & Pacific. It is estimated that the Santa Fe would have taken from that road revenues amounting to $600,000 or $700,000 per annum (*Lancaster v. Gulf, Colorado & Santa Fe, supra,* p. 493). The purpose and effect of the Santa Fe trackage was to extend the Santa Fe's line of railroad substantially into new territory and also into territory already served adequately by another carrier.

In the case at bar, respondent was constructing its industrial spur or switching track upon a tract of land containing about 500 acres lying immediately adjacent to its main line, which constituted a part of the territory served by respondent for many years and by no other common carrier by railroad. The purpose and effect of respondent's track was to provide switching facilities, in response to an existing demand therefor, as a means of securing the location of industries upon this property. Experience has shown that these industries would not locate thereon unless the switching facilities were provided in advance of such location.

In *Texas & Pacific Case, supra,* there was involved the building of a line which might have been entirely unnecessary, involving a waste of resources with consequent burden of such waste falling upon the public and the lessening of the earning capacity of another carrier. As pointed out by this Court, that construction involved questions within the railroad policy established by the Transportation Act of 1920 and therefore of national concern. In the case at bar, there

is involved no question of building unnecessary lines involving a waste of resources, and no question of lessening of the earning capacity of another carrier. Respondent's track was merely a local switching facility that must be provided by railroads for the purpose of securing the location of industries adjacent to their rails. As pointed out by the Commission in the *Los Angeles Switching Cases, supra* (p. 313), "there are literally hundreds of thousands of such tracks in this country" and they are "in fact a necessity to both the carrier and the shipper under modern conditions of business and transportation." This track, under the decision of this Court in the *Texas & Pacific Case, supra,* is a matter of local concern and "the question whether the construction should be allowed or compelled depends largely upon local conditions which the State regulating body is peculiarly fitted to appreciate."

If there can be any doubt that respondent's track is an industrial spur or switching track, the following provision contained in the deed from Emma Rose, granting respondent a right of way for its track, should remove all doubt (Exhibit 7, p. 4):

> "That the grade or grades of the railroad track or tracks on the parcel of land above described, and the elevation of said track or tracks shall be such as to best serve the land as it now is for industrial purposes, and the elevation of such track or tracks to be constructed on said parcel of land hereinabove described shall be subject to the approval of the grantors; and in the event the

grantors fill their land adjoining said parcel of land above described, the grantee will, upon receipt of written notice from the grantors, raise said track or tracks and fill the parcel of land above described to the same level of the adjoining land of the grantors."

This provision shows that respondent's track is to be constructed in such a way and upon such grade as will best serve the Emma Rose property industrially and not in such manner as to serve any other territory. If respondent were constructing a main line or a main branch line rather than an industrial spur or switching track it is inconceivable that it would agree that the grade of such track would be subject to the approval of the grantor of the right of way or that respondent, after once having established the grade, would change such grade upon request of the grantor to make such grade conform to the individual requirements of the property of one individual. This provision shows conclusively that the track was being built as an industrial spur or switching track for the development of the Emma Rose property industrially and not as an extension of respondent's line of railroad and is an industrial spur or switching track within the meaning of those words as used in paragraph (22) of Section 1 of the Interstate Commerce Act.

There is nothing in the decision in *Missouri-Pacific R. Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 41 F. (2d) 188, certiorari denied 282 U. S. 866 (cited in petitioner's brief, p. 45), which is contrary to re-

spondent's position that its track was not being built into new territory and that its track is an industrial spur or switching track within paragraph (22) of Section 1.

Counsel refer to that case as one "in which the Circuit Court of Appeals of the Eighth Circuit in effect ruled that in a single city there may be territory within 3,700 feet of its rails, adaptable to industrial purposes, reasonably accessible to each of two railroad carriers serving the city, *which is not in fact occupied or served by either,* and that in such event neither can occupy and serve such territory without authorization under said Paragraph (18) to (21)." That case did not so hold either directly or "in effect."

In the case referred to, the Missouri-Pacific was enjoined from extending its line across the tracks of the Rock Island into territory beyond the tracks of the latter road on the ground that it was an extension of line within the meaning of paragraph (18) of Section 1 of the Interstate Commerce Act. The Court held that the evidence in the case established the fact that the territory into which the proposed construction was to be projected was already occupied and served to a very considerable extent by the Rock Island and that it was entirely feasible for the whole territory to be occupied and served by the same railroad company whenever necessary. The Court did not suggest and there is nothing contained in the opinion from which an inference can be drawn that it was the opinion of the Court that it would be necessary for the Rock

Island to secure authority from the Commission to construct industrial spur or switching tracks in this particular territory. The only logical inference that can be drawn from the language of the Court is that the territory involved was a part of the territory of the Rock Island.

CONCLUSION.

Measured by every test which the courts have applied in interpreting and applying paragraphs (18) to (22) of Section 1 of the Act, the track which is the subject of this controversy is clearly shown to be an industrial spur or switching track and its construction and operation are governed by the provisions of paragraph (22).

The proposed trackage does not extend "into new territory" or "into territory not heretofore served" by respondent but, on the contrary, it leads off of its main line right of way onto a tract of land immediately adjacent, which has been served by respondent for many years. It does not "extend into territory already served by any other carrier," as there is no other carrier by rail serving the City of San Mateo.

The construction and operation of respondent's track "is not inimical to the National interest" but is in furtherance of "the railroad policy introduced by the Transportation Act" of "developing and maintaining for the people of the United States an adequate railway system" by improving respondent's

facilities required by shippers already served and supplying facilities to others similarly situated who are desirous of locating their establishments within the same territory and are entitled to like service from respondent. The track will provide an additional facility similar to the "literally hundreds of thousands of such tracks in this country."

There is no evidence in the record showing that it was the intention or plan of respondent to extend its track beyond the boundaries of the 500 acre tract which this track will serve, and therefore there will be no invasion by the proposed construction of territory adequately or at all served by any other carrier.

The mere possibility of respondent extending its track beyond the boundaries of the Rose tract does not justify the application of any other test or "guide" than has been applied by the courts.

The National policy surely did not contemplate that industrial territory ing immediately adjacent to a carrier's main line and in the immediate vicinity of industries already served by existing spurs should remain undeveloped industrially. By the adoption of paragraph (22), Congress manifested its policy of rendering it possible for carriers to provide conveniently and expeditiously facilities required by shippers already served by "literally hundreds of thousands of such tracks in this country" and other shippers desirous of having the same service. The magnitude of such construction is forcibly called to attention by the fact that at the time this controversy

arose respondent had under construction over 200 tracks of similar character (R. 152).

There would be a serious interference with the commerce of the United States were the carriers obliged to obtain the Commission's sanction before constructing industrial spurs which this Court has held are, in a real sense, railroad terminals and the commerce of the country would suffer if the carriers, in the discharge of their duty, were not free to anticipate the requirements of shippers and install these facilities expeditiously.

The decree of the District Court entered on February 28, 1930, granting petitioner an injunction restraining respondent from completing the construction of its partially completed track and operating it after completion is erroneous and should be reversed.

Respectfully submitted,

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Dated: San Francisco, California.
October 12, 1931.

(APPENDIX FOLLOWS.)